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In The

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1293

LLOYD PLUMMER,

Petitioner,

vs.

DANIEL KLEPAK, as Chairman of the NEW YORK STATE DRUG ABUSE CONTROL COMMISSION and NEW YORK STATE DRUG ABUSE CONTROL COMMISSION,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO GRANTING CERTIORARI

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Statement

The respondents submit this brief in opposition to the petitioner's application for certiorari to review the order of the Court of Appeals of the State of New York which unanimously reversed the order of the Appellate Division of the Supreme Court, Second Judicial Department and dismissed the petition. The Appellate Division order had affirmed a judgment of the Supreme Court of the State of New York, Kings County, which had granted the petition seeking to annul a determination of the respondents. Respondents' determination had implemented the provision of a collective bargaining agreement which provides that an employee absent from work without authorization for ten consecutive days shall be deemed to have resigned from his position.

Questions Presented

1. Was the Petitioner required to exhaust available and adequate remedies under the collective bargaining agreement?

2. Did petitioner fail to exhaust available contract remedies by failing to timely file a grievance as required by the agreement?

3. Should not the petitioner be legally bound to the waiver of judicial due process contained in the collective bargaining agreement negotiated in his behalf?

Respondents contend that the questions should be answered in the affirmative.

Facts

Petitioner was an employee of the New York Drug Abuse Control Commission. On October 7, 1975 petitioner was informed by respondent that, pursuant to section 15.10 (A-1)* of the Agreement between the State of New York and the Security Unit, Council 82 of the American Federation of State, County, Municipal Employees, petitioner's union representative, as well as pursuant to Rule 5.3(d) of the New York State Rules for the Classified Civil Service (4 NYCRR 5.3[d], repealed February 27, 1979) his unexplained absence since September 16, 1975 constituted a resignation from his position.

Thereafter, on November 5, 1975, petitioner purported to file a grievance pursuant to Article 7 (A-1) of the Agreement. The grievance was rejected as untimely since it had not been presented within ten days of the date petitioner first knew of his termination.

Petitioner then commenced the instant proceeding to annul the respondents' action and for reinstatement to his position. A Special Term of the Supreme Court of the State of New York

*Numbers preceded by A refer to appendix hereto.

ordered petitioner's reinstatement finding that his termination was contrary to law. The Appellate Division unanimously affirmed. The New York State Court of Appeals unanimously reversed the order of the Appellate Division.

Opinion of the Court of Appeals (48 NY2d 486)

After reviewing the facts, the Court (per JASEN, J.) stated:

> "Initially, we address the conclusions reached by the Appellate Division that petitioner's resignation was disciplinary in nature and that respondents were obliged to invoke the notice and hearing procedures outlined in article 8 of the collective bargaining agreement ('Discipline'). This characterization of petitioner's termination as 'disciplinary' is at variance with the terms of the collective bargaining agreement in which the parties agreed that an unauthorized and unexplained absence for ten consecutive workdays would be deemed a *resignation*. In our opinion, this dispute between the parties concerned the application of provisions of the agreement. Thus, it was incumbent upon petitioner to file a grievance within ten days of the date he first learned of his termination as mandated by article 7 of the agreement. (See *Matter of Flemming v Cagliostro*, 53 AD2d 187, mot for lv to app den 40 NY2d 806.) This, he did not do.
>
> "Since petitioner failed to avail himself of the grievance procedure set forth in the collective bargaining agreement, he is precluded from seeking relief under article 78 of the CPLR. (See, e.g., *Matter of Flemming v Cagliostro*, 53 AD2d, at p 189, *supra; Merante v Burns*, 47 AD2d 671; see also, *Slater v Gallman*, 38 NY2d 1.)
>
> "Petitioner, having designated the union as his collective bargaining agent, is bound by the terms of the agreement negotiated for and made on his behalf. (*Schacht v City of New York*, 39 NY2d 28, 32.) The collective bargaining agreement expressly provides that an unauthorized absence for ten consecutive workdays would be deemed to constitute a resignation. The bargain

having been struck and the parties having agreed to a procedure for the resolution of disputes involving this provision, petitioner should not now be heard to complain, having failed to avail himself of the administrative remedies outlined in the collective bargaining agreement. (See *Matter of Flemming v Cagliostro*, 53 AD2d 187, *supra*.)

"Nor is our holding today in conflict with our prior decision in *Matter of Johnson v Director, Downstate Medical Center* (41 NY2d 1061). Although in *Johnson* we held that subdivision (d) of section 5.3 of the Rules and Regulations of the Department of Civil Service (former 4 NYCRR 5.3[d]) was invalid since its provisions were in conflict with section 75 of the Civil Service Law, we did not reach the further issue — presented by this appeal — whether a parallel provision embodied in a collective bargaining agreement would also be void."

ARGUMENT

The petition should be denied because the record demonstrates that petitioner was granted all the process that was due when the fact of his untimely application under the controlling provisions of a collective bargaining agreement is measured against the applicable provisions of law.

The central factor and that which is dispositive of the issue presented is that the termination of petitioner's employment resulted from the implementation of a provision of a collective bargaining agreement entered into between his employer and his union representative. There is no issue, notwithstanding petitioner's references thereto, as to whether a permanently appointed New York State employee has a constitutionally protected interest in his employment (see: *Board of Regents v Roth*, 408 US 564, 33 L ed 2d 548 [1972]). Nor does this case involve the imposition of discipline upon a tenured employee.* Further, there is no issue as to the validity of any provision of New York State law or rule or regulation pertaining to resignation from a position in the classified service (see: *Johnson v Downstate Medical Center*, 41 NY2d 1061 [1977]). Rather, the petitioner was terminated as a result of his "deemed resignation" as provided for in his union agreement and the issue can only be whether he should be held to the terms of his contract.

In addition to the provisions of New York State Civil Service Law §75, which confers tenure and due process protection upon certain eligible classes of State employees, Civil Service Law §76, subdivision 4 states, in part:

> "Nothing contained in section seventy-five or seventy-six of this chapter shall be construed to repeal or modify

*Article 15 of the agreement pertains to "Attendance and Leave"; section 15.10 ("Unauthorized Absence") is applicable here. Article 8 of the agreement pertains to discipline; there is absolutely nothing in the record to establish that the provisions of Article 8 were utilized by respondents.

> any general, special or local law or charter provision relating to the removal or suspension of officers or employees in the competitive class of the civil service of the state or any civil division. Such sections may be supplemented, modified or replaced by agreements negotiated between the state and an employee organization pursuant to article fourteen of this chapter. * * *"

Petitioner is thus bound by the collective bargaining agreement by his membership in a unit represented by the union irrespective of whether he supported the contract when approved (*Farrell v Carey*, 62 AD2d 583, app dsmd 45 NY2d 832, app dsmd 47 USLW 3527, cert den 47 USLW 3554 [1979]; *Antinore v State of New York*, 49 AD2d 6, affd 40 NY2d 921). When respondents proceeded to implement section 15.10 of the agreement (on October 7, 1975), because petitioner had been absent without leave since September 16, 1975, it was petitioner's right and obligation, if he wished to challenge said action, to utilize the provisions of the agreement provided therefor. Specifically, since petitioner challenged the respondents' determination to use the "deemed resignation" provision, he was required to follow the procedures set forth in section 7.1, paragraph A (A-1) of the agreement, which states that "a dispute concerning the application and/or interpretation of this agreement is subject to all steps of the grievance procedure * * *." Since petitioner concedes that he did not timely institute the grievance procedure, he was properly barred from relief thereunder and he was properly held to have been barred from instituting the instant proceeding (see *Watergate v Buffalo Sewer Authority*, 46 NY2d 52, 57 [1978]; *Rieder v State University of New York*, 39 NY2d 845 [1976]; *Flemming v Cagliostro*, 53 AD2d 187, lv to app den 40 NY2d 806 [1976]; *Farrell v Carey, supra*).

Not only was petitioner properly denied relief because of his failure to follow the provisions of the agreement and applicable State law, but those very provisions, which he now attacks, afford all the process which was due to him. Due process is a flexible concept the dimensions of which may vary according to

the circumstances (*Mathews v Eldridge*, 424 US 319, 47 L ed 2d 18 [1976]; *Cafeteria Workers v McElroy*, 367 US 886, 6 L ed 2d 1230 [1961]). The provisions of the agreement, together with New York Civil Practice Law and Rules, Article 75 providing for judicial review of an arbitration award, afforded the due process herein. There is a strong public policy that favors the exclusion of the Courts from matters which are subject to arbitration (*Buffalo Forge Co. v Steelworkers*, 428 US 397, 49 L ed 2d 1022 [1976]; *United Steelworkers v Warrior & Gulf Navigating Co.*, 363 US 574, 4 L ed 2d 1409 [1960]) and due process requirements can be satisfied by the arbitration process (*Chung v Park*, 514 F2d 382 [3d Cir, 1975], cert den 423 US 948; *Antinore v State of New York, supra*).

Finally, should it be found that the full panoply of due process was not available to petitioner, it is clear that the union agreement constitutes a valid and binding waiver thereof. Such was the holding in *Farrell v Carey (supra)*, which involved termination of tenured employees as a result of fiscal exigencies. Similarly, in *D.H. Overmyer Co. v Frick Co.* (405 US 174, 185, 31 L ed 2d 124, 133 [1972]) this Court held that due process rights to notice and hearing prior to civil judgment are subject to waiver (see, also: 16 Am Jur 2d 1057 [Constitutional Law, §846]). Petitioner has placed mistaken reliance, it is submitted, upon *Alexander v Gardner-Denver Co.* (415 US 36 [1974]). There was in that case a wholly different issue arising under facts and law having no resemblance to the issue herein; the essence of the difference was stated as follows (id., 415 US at p 52): "Although presumably an employee may waive his cause of action under Title VII [of the Civil Rights Act of 1964] as part of a voluntary settlement, mere resort to the arbitral forum to enforce contractual rights constitutes no such waiver."

Here the issue, unrelated to the Civil Rights Act, is quite different. The petitioner's union agreement specifically sanctions the action taken by respondents and describes and delimits the remedies available to petitioner. Petitioner failed to timely

avail himself of those remedies. His legal position was described by Mr. Justice REHNQUIST in *Arnett v Kennedy,* 416 US 134, 153, 40 L ed 2d 15, 33) as follows:

> "[W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant * * * must take the bitter with the sweet."

The bargain having been struck, petitioner should not now be heard to complain as to its adverse impact, particularly when he has failed to adhere to its terms.

CONCLUSION

Petitioner's application for Certiorari should be denied.

Dated: March 3, 1980
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Respectfully submitted,

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APPENDIX

APPENDIX

"ARTICLE 7

"Grievance and Arbitration

"7.1 Definitions

"For the purposes of this Agreement all disputes shall be subject to the grievance procedure as outlined below:

"A. A dispute concerning the application and/or interpretation of this Agreement is subject to all steps of the grievance procedure including arbitration, except those provisions which are specifically excluded.

• • •

"7.2 Procedure

"A. Grievance

"Step 1. The employee or the employee and a Union grievance representative shall present the grievance orally to the employee's immediate supervisor within ten calendar days of the act or omission giving rise to the grievance or within ten calendar days of the date on which the employee first knew of such act or omission. The immediate supervisor shall meet with the persons involved in the dispute and shall render a decision within five working days from the day of such meeting.

• • •

"ARTICLE 15

"15.10 Unauthorized Absence

"Any employee absent from work without authorization for ten consecutive workdays shall be deemed to have resigned from his position if he has not provided a satisfactory explanation for such absence on or before the eleventh workday following the commencement of such unauthorized absence."